

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE VALVE ANTITRUST LITIGATION

Case No. 2:21-cv-00563-JCC

**PLAINTIFFS' LOCAL CIVIL RULE
7(g)(2) SURREPLY MOTION TO
STRIKE**

NOTE ON MOTION CALENDAR:
August 12, 2024

1 Plaintiffs respectfully move to strike limited aspects of Valve’s Reply Brief in Support of
 2 Its Motion to Exclude Testimony of Steven Schwartz, Ph.D. (“*Daubert* Reply”) (Dkt. 337) and the
 3 entirety of the supporting Reply Expert Report of Ashley Langer, Ph.D. (“*Langer* Reply”)
 4 (Dkt. 338-1).¹

5 **I. BACKGROUND**

6 On January 16, 2024, the Court ordered the parties’ Stipulated Motion to Modify Case
 7 Schedule, which provides the following deadlines: (1) February 8, 2024 for Plaintiffs to file their
 8 opening class certification motion and serve opening expert reports in support of class
 9 certification, (2) May 17, 2024 for Valve to oppose class certification, file *Daubert* motions, and
 10 serve their rebuttal expert reports, (3) July 12, 2024, for Plaintiffs to file their reply class
 11 certification brief, file *Daubert* motions and oppositions, and serve reply expert reports in further
 12 support of class certification, and (4) August 12, 2024 for Valve to file their *Daubert* Reply brief.
 13 Dkt. 176. Notably, the schedule does *not* allow Valve to serve expert reply or surreply reports.
 14 The schedule instead closed expert discovery on July 26, 2024, roughly three weeks before
 15 Valve’s *Daubert* Reply was due. *Id.*

16 Nevertheless, on August 12, 2024, Valve served the “reply report” of Dr. Langer, as an
 17 exhibit to its *Daubert* Reply brief. *See* Dkts. 337, 338-1.

18 **II. THE COURT SHOULD STRIKE VALVE’S NEW REPLY ARGUMENTS
 19 WHICH ARE PREMISED ON AN UNTIMELY EXPERT REPORT**

20 A moving party cannot “introduce new facts or different legal arguments in the reply brief
 21 than those presented in moving papers.” *Cnty. Ass’n for Restoration of Env’t Inc. v. Wash. Dairy*
Holdings LLC, 2019 WL 13117758, at *8 (E.D. Wash. Oct. 24, 2019); *Wild Fish Conservancy v.*
U.S. Envt’l Prot. Agency, 331 F. Supp. 3d 1210, 1219 n.3 (W.D. Wash. 2018). Because such
 23 arguments deprive the opposing party of the ability to respond, courts routinely strike them. *See*,
 24 *e.g.*, *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1110, 1122 n.6 (W.D. Wash. 2007)

26
 27 ¹ Though styled as a “reply” report, in fact, Langer’s “Reply” is a surreply expert report,
 responding to the reply expert report of Plaintiffs’ economist Dr. Schwartz.

1 (striking new arguments raised for the first time on reply); *Alaska Local 375 Plumbers &*
 2 *Pipefitters Trust Funds v. Wolf Creek Fed. Servs., Inc.*, 2023 WL 2138302, at *3 (W.D. Wash.
 3 Feb. 21, 2023) (striking new argument raised in reply brief); *see also Bridgham-Morrison v. Nat'l*
 4 *Gen. Assembly Co.*, 2015 WL 12712762, at *2 (W.D. Wash. Nov. 16, 2015) (“new arguments and
 5 evidence presented for the first time on Reply...are generally waived or ignored.”).

6 Further, Federal Rule of Civil Procedure 26(a)(2)(D) “requires a party to disclose the
 7 identity of a witness it intends to call as an expert and, in the case of a witness who is retained or
 8 specifically employed to provide expert testimony in the case, ‘at the time and in the sequence that
 9 the court orders.’” *Rekor Sys., Inc. v. Loughlin*, 2022 WL 2063857, at *5 (S.D.N.Y. June 8, 2022)
 10 (quoting Fed. R. Civ. P. 26(a)(2)(D)). “Rule 37(c)(1) gives teeth to these requirements by
 11 forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not
 12 properly disclosed.” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.
 13 2001). Courts will exclude expert opinions that are not timely disclosed under the case schedule
 14 set by the court. *See, e.g., Miller v. United States*, 2019 WL 4511807 (W.D. Wash. Sept. 19, 2019)
 15 (excluding opinions not disclosed until after the expert discover cutoff), *order clarified*, 2019 WL
 16 6683519 (W.D. Wash. Dec. 6, 2019); *Bell v. Boeing Co.*, 2022 WL 1206728, at *6 (W.D. Wash.
 17 Apr. 22, 2022) (“Bell’s failure to meet the expert report deadline in this case is simply
 18 unacceptable.”).

19 Here, Valve violates both of these basic notions of fairness. The first section of Valve’s
 20 reply brief—relating to Steam Keys—offers new arguments concerning Plaintiff Wolfire’s use of
 21 Steam keys. Dkt. 337 at 3:1-4:2. Valve similarly offers new arguments concerning Steam
 22 Community Market transactions, *id.* at 5:13-6:3, suggesting these transactions are relevant to a
 23 two-sided platform analysis, despite not being included in Plaintiffs’ damages model at all.

24 Further, Valve relies upon new expert testimony which was not timely disclosed within the
 25 case schedule, including new data analyses regarding Wolfire’s use of Steam Keys, Langer Reply
 26 ¶¶ 3-4, and new economic opinion concerning Valve’s Steam Community Market and the
 27

1 appropriateness of considering such Market transactions in analyzing Valve's platform, *id.* ¶¶ 7,
 2 17.

3 By raising these arguments and proffering untimely expert testimony for the first time on
 4 reply, Valve has improperly deprived Plaintiffs of the ability to respond. Accordingly, Plaintiffs
 5 respectfully request that the new argument contained in Valve's Reply at 3:1-4:2 and 5:13-6:3 be
 6 stricken, and that the untimely Langer Reply Report be stricken in full. Valve's new arguments
 7 could and should have been made in its opposition brief and rebuttal expert reports. *See Wash.*
 8 *Cities Ins. Auth. v. Ironshore Indemn., Inc.*, 443 F. Supp. 3d 1218, 1220 n.1 (W.D. Wash. 2020)
 9 (granting a motion to strike exhibits attached to a reply brief where the evidence was available, but
 10 not filed, earlier); *see also Kimsey v. City of Sammamish*, 574 F. Supp. 3d 911, 922 (W.D. Wash.
 11 2021) (granting a motion to strike declarations filed with a reply where the declarations attested to
 12 alleged facts that could have been identified with the initial motion).

13 In the event the Court is inclined to consider any of Valve's untimely submissions,
 14 Plaintiffs request that they be given four pages to respond in a brief, and that Plaintiffs be granted
 15 permission to file a short surreply expert report. *Fleming v. Parnell*, 2013 WL 4511494, at *2
 16 (W.D. Wash. Aug. 23, 2013) (granting motion for leave to file substantive surreply to address new
 17 reply arguments); Minute Order, *In re Valve Antitrust Litig.*, No. 2:21-cv-00563-JCC (W.D.
 18 Wash.), Oct. 5, 2021, Dkt. 64 (same).

19 **CONCLUSION**

20 Plaintiffs respectfully request that the new arguments contained in Valve's *Daubert* Reply
 21 brief, and the entirety of the untimely Langer Reply report, be stricken. To the extent the Court is
 22 inclined to consider the new material, Plaintiffs request the opportunity to briefly respond, as set
 23 out above.

24
 25
 26
 27

1 DATED: August 19, 2024

2 /s/ Alicia Cobb

3 Alicia Cobb, WSBA #48685
4 QUINN EMANUEL URQUHART &
5 SULLIVAN, LLP
6 1109 First Avenue, Suite 210
7 Seattle, Washington 98101
Phone (206) 905-7000
Fax (206) 905-7100
aliciacobbs@quinnemanuel.com

8 Steig D. Olson (*pro hac vice*)
9 David LeRay (*pro hac vice*)
10 Nic V. Siebert (*pro hac vice*)
11 Andrew Faisman (*pro hac vice*)
12 QUINN EMANUEL URQUHART &
13 SULLIVAN, LLP
14 51 Madison Avenue
New York, New York 10010
Phone (212) 849-7231
Fax (212) 849-7100
steigolson@quinnemanuel.com
davidleray@quinnemanuel.com
nicolassiebert@quinnemanuel.com
andrewfaisman@quinnemanuel.com

15 Adam Wolfson (*pro hac vice*)
16 QUINN EMANUEL URQUHART &
17 SULLIVAN, LLP
18 865 S. Figueroa St., 10th Floor
Los Angeles, California 90017
Phone (213) 443-3285| Fax (213) 443-3100
adamwolfson@quinnemanuel.com

19 Ankur Kapoor (*pro hac vice*)
20 Noah Brecker-Redd (*pro hac vice*)
21 CONSTANTINE CANNON LLP
6 East 43rd St., 26th Floor
22 New York, NY 10017
Phone (212) 350-2700
Fax (212) 350-2701
akapoor@constantinecannon.com
nbrecker-redd@constantinecannon.com

23 J. Wyatt Fore (*pro hac vice*)
24 CONSTANTINE CANNON LLP
25 1001 Pennsylvania Ave., NW, Suite 1300N
26 Washington, D.C. 20004
Phone (202) 204-4527
Fax (202) 204-3501
wfore@constantinecannon.com

Respectfully submitted,

2 /s/ Stephanie L. Jensen

3 Stephanie L. Jensen, WSBA #42042
4 Tyre L. Tindall, WSBA #56357
5 WILSON SONSINI GOODRICH &
6 ROSATI P.C.
7 701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
Phone (206) 883-2500
Fax (866) 974-7329
sjensen@wsgr.com
ttindall@wsgr.com

8 Kenneth R. O'Rourke (*pro hac vice*)
9 Jordanne M. Steiner (*pro hac vice*)
10 WILSON SONSINI GOODRICH &
11 ROSATI, P.C.
12 1700 K Street, NW, Suite 500
13 Washington, DC 20006
14 Phone (202) 973-8800
15 Fax (866) 974-7329
16 korourke@wsgr.com
17 jordanne.miller@wsgr.com

18 W. Joseph Bruckner (*pro hac vice*)
19 Joseph C. Bourne (*pro hac vice*)
20 Laura M. Matson (*pro hac vice*)
21 LOCKRIDGE GRINDAL NAUEN P.L.L.P.
22 100 Washington Avenue S, Suite 2200
23 Minneapolis, MN 55401
24 Phone (612) 339-6900
25 Fax (612) 339-0981
26 wjbruckner@locklaw.com
27 jcbourne@locklaw.com
lmmatson@locklaw.com

28 Kyle Pozan (*pro hac vice*)
29 LOCKRIDGE GRINDAL NAUEN P.L.L.P.
30 1165 N. Clark Street, Suite 700
31 Chicago, IL 60610
32 Phone (612) 339-6900
33 Fax (612) 339-0981
34 kjpozan@locklaw.com

35 *Interim Co-Lead Counsel*

1 *Interim Co-Lead Counsel*

2 Kenneth J. Rubin (*pro hac vice*)
3 Timothy B. McGranor (*pro hac vice*)
4 Kara M. Mundy (*pro hac vice*)
5 Douglas R. Matthews (*pro hac vice*)
6 Vorys, Sater, Seymour and Pease LLP
7 52 East Gay Street
8 Columbus, Ohio 43215
9 Phone (614) 464-6400
10 Fax (614) 719-4796
11 kjrubin@vorys.com
12 tbmcgranor@vorys.com
13 kmmundy@vorys.com
14 drmatthews@vorys.com

15 Thomas N. McCormick (*pro hac vice*)
16 Vorys, Sater, Seymour and Pease LLP
17 4675 MacArthur Court, Suite 700
18 Newport Beach, California 92660
19 Phone (949) 526-7903 | Fax (949) 383-2384
20 tnmccormick@vorys.com

21 *Executive Committee Member*

LCR 7 CERTIFICATION

I certify that this memorandum contains 1,028 words, in compliance with the 1,050 word limit set forth in Local Civil Rule 7(e)(2).

DATED: August 19, 2024

/s/ Alicia Cobb
Alicia Cobb, WSBA #48685

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2021, I caused a true and correct copy of the foregoing to be filed in this Court's CM/ECF system, which sent notification of such filing to counsel of record.

DATED: August 19, 2024

/s/ Alicia Cobb
Alicia Cobb, WSBA #48685